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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 889

DOUGLAS H. McDONALD, TRUSTEE, *Petitioner*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and WEHT, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The Report and Order of the Federal Communications Commission is unofficially reported at 15 Pike & Fischer R.R. 1573, and begins at page 15 of the Joint Appendix. The Memorandum Opinion and Order of the Commission denying a petition for reconsideration is unofficially reported at 15 Pike & Fischer R.R. 1586, and begins at page 52 of the Joint Appendix.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 262

E. 2d 702 (1958), and is contained in Appendix A to this petition. The Order of the Court of Appeals denying a petition for rehearing en banc is contained in Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on December 18, 1958. An order denying a petition for rehearing en banc was entered by the Court of Appeals on February 2, 1959.*

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C., § 1254 (1), and Section 402 (j) of the Communications Act of 1934, Act of June 7, 1934, c. 426, 48 Stat. 926, as amended, 47 U.S.C., § 402 (j).

QUESTIONS PRESENTED

1. Are the notice requirements of Section 4 of the Administrative Procedure Act satisfied where the Federal Communications Commission issues a notice of proposed rule making inviting comments on one rule (a television channel assignment), and as its final action in the proceeding, adopts a different rule (channel assignment) that appeared only in a private person's comments and never in a public notice of the agency?

2. Is it rational for the Federal Communications Commission to delete Channel 9 from Hatfield, Indiana, on the premise that Channel 7, Evansville, is simultaneously being deleted, when, in fact, Channel 7, Evansville, is not being simultaneously deleted?

* After the petition for rehearing was denied, Douglas H. McDonald, Trustee, was substituted for Evansville Television, Inc., as appellant-petitioner.

STATUTE INVOLVED

This case involves Section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003, which, in pertinent part, is as follows:

> "(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include . . . (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. * * *
>
> "(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner * * *."

STATEMENT OF THE CASE

Section 3.606 of the Federal Communications Commission's Rules is a community by community listing of all television assignments. Since the adoption of the Table of Assignments on April 14, 1952, many proceedings of limited scope have been held for the purpose of considering changes in specific allocations set forth in the Table. These have been written rule making proceedings involving the submission of comments and reply comments. The instant case was such a proceeding.

The case, as finally decided by the Commission, concerned VHF Channel 7, Evansville, Indiana, and VHF Channel 9, Hatfield, Indiana, a community 21 miles from Evansville. Petitioner, Douglas H. McDonald (hereinafter called WTVW), has since February 11, 1959, been the permittee of Television Station WTVW, Channel 7, Evansville, Indiana, having suc-

ceeded to the Channel 7 permit as a consequence of his being appointed Trustee of Evansville Television, Inc., in a proceeding under Chapter X of the Bankruptcy Act. Evansville Television, Inc., received a grant of Channel 7, on December 27, 1955, at the end of a comparative hearing, and began operation of Television Station WTVW on August 21, 1956. Channel 9, Hatfield, has been the subject of a comparative hearing between Owensboro On The Air, Inc., and Owensboro Publishing Company (hereinafter referred to as the Channel 9 applicants).

On June 26, 1956, the Commission issued a Notice proposing to delete Channel 7 as a commercial assignment and to reserve the channel for educational use, as follows:

In the Matter of

Amendment of Section 3.606,

Table of Assignments,

Television Broadcast Stations
(Evansville, Indiana)

NOTICE OF PROPOSED RULE MAKING

1. Notice is hereby given of rule making in the above-entitled matter.

2. The Commission today adopted a Report and Order in its general television allocation proceeding in Docket No. 11532, outlining a long-range program designed to improve the television allocation structure and at the same time specifying the basis on which it would consider channel changes in the interim with the view to improving the immediate television situation in individual communities. As a part of this interim program of channel reassignments and in accordance with the general objectives outlined in the above Report and Order, the Commission is proposing the following channel changes:

City—Evansville, Indiana

Channel No.
Present—7, 50, *56, 62
Proposed—*7, 50, 56, 62

(Offset carrier designations for the various channels will be specified in the final Report and Order.)

3. Any interested party who is of the view that the proposed amendment should not be adopted, or should not be adopted in the form set forth herein, may file with the Commission on or before September 10, 1956, a written statement setting forth his comments. Comments supporting the proposed amendment may also be filed on or before the same date. Comments in reply to original comments may be filed within 15 days from the last date for filing said original comments. No additional comments may be filed unless (1) specifically requested by the Commission or (2) good cause for the filing of such additional comments is established.

4. Parties submitting comments in this proceeding are requested to direct their attention to the matters discussed in paragraph 31 of the Commission's Report and Order issued today in Docket No. 11532. All data indicating television coverage should be filed in accordance with the procedures specified in paragraphs 38-40 of the above Report and Order.

* * * *

[The asterisk before a channel assignment indicates that the channel is reserved for non-commercial eductional use.]

On July 13, 1956, Mid-America Broadcasting Corporation, a company owning a radio station in Louisville, Kentucky, filed a petition suggesting that Channel 7, Evansville, be shifted to Louisville rather than reserved in Evansville for educational use. On Octo-

ber 22, 1956, the Commission issued a Memorandum Opinion and Order giving notice that Mid-America's proposal that Channel 7 be reallocated to Louisville could properly be considered as a counterproposal in the Evansville proceeding.

On December 3, 1956, the last day for filing comments in the proceeding, WEHT and WFIE, WTVW's two Evansville UHF competitors, filed joint comments supporting the plan to delete Channel 7 from Evansville, and, for the first time, introducing a new plan to delete Channel 9 from Hatfield. There was no requirement of service, but courtesy copies of these comments were mailed to WTVW and the Channel 9 applicants.

On December 28, 1956, the date for filing reply comments, the Channel 9 applicants filed a motion to strike the comments proposing the deletion of Channel 9 from Hatfield on the ground that that proposal was outside the scope of the June 26th Notice (J.A., pp. 13-15). The Channel 9 applicants made no arguments on the merits with respect to Channel 9.

WTVW's comments of December 3, 1956, were directed to opposing the only proposals then outstanding, viz., the educational reservation of Channel 7 or the transfer of the channel to Louisville. In its reply comments of December 28, 1956, it pointed out at length that Section 4 of the Administrative Procedure Act precluded consideration of the deletion of Channel 9 in the proceeding, and also briefly opposed the suggestion that Channel 9 be deleted from Hatfield, not as comments on the merits of the proposal, but to urge that the Commission reject the proposal at the threshhold without issuing a further notice of rule making. Although voluminous comments were filed in opposition to the deletion of Channel 7 before the final de-

cision, no other statements were filed in opposition to the deletion of Channel 9.

On March 1, 1957, the Commission issued a final Report and Order in this proceeding proposing to delete Channel 7 from Evansville in an adjudicatory proceeding which it instituted that same day. It deleted Channel 9 from Hatfield and shifted it to Evansville where it is now an educational reservation. The Commission in that Report and Order denied the motion to strike of the Channel 9 applicants and rejected the similar arguments of WTVW as to the absence of notice (J.A., pp. 31-32; par. 28, March 1, 1957 Report and Order).

The Channel 9 applicants went directly to the Court of Appeals from the March 1, 1957, Report and Order. WTVW, on the other hand, petitioned for reconsideration, urging that the Commission had violated Section 4 of the APA in failing to give notice that Channel 9 might be deleted in the case. On June 24, 1957, the Commission denied WTVW's petition for reconsideration, and stated in support of its rejection of the notice arguments:

> "It is well established that the Commission is not confined to the adoption of amendments as specifically proposed in Notices of Proposed Rule Making but may also consider, and where it finds appropriate, adopt counterproposals falling within the general scope of the rule making proceeding." (J.A., p. 53; par. 3, June 24, 1957 Memorandum Opinion and Order)

On July 24, 1957, WTVW filed a notice of appeal from the action of the Commission deleting Channel 9 in the United States Court of Appeals for the District of Columbia Circuit, pursuant to Section 402(b) of the Communications Act of 1934, as amended, 66

Stat. 718, 47 U.S.C. Sec. 402 (b). WTVW simultaneously filed a petition for review pursuant to Section 402 (a) of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. Sec. 402 (a). WTVW's cases were consolidated with the appeals of the Channel 9 applicants from the deletion of Channel 9.

On December 18, 1958, a division of the Court of Appeals, by a 2-1 vote, affirmed the Commission's order. Judges Danaher and Bastian voted to affirm, and Judge Fahy dissented.

The majority concluded that "there were both the actual notice and a description of the subjects and the issues involved as required by Sec. 4 (a)" (p. 12, Slip Opinion), because WTVW and the Channel 9 applicants had "actual notice" of the existence of comments proposing the deletion of Channel 9, and because they should have inferred from the background and history of proposals for deintermixture of the Evansville-Hatfield area, that a notice of rule making proposing the deletion of Channel 7, Evansville, opened the proceeding to the deletion of Channel 9, Hatfield.

Judge Fahy, in his dissent, stated that the Notice was inadequate to support the deletion of Channel 9, since it did not fairly apprise interested parties of the issues involved; that the legislative history of Section 4 of the APA demonstrates that "where notice is required, it should be complete and specific"; and that the Commission was obliged to rule on the objections to the involvement of the deletion of Channel 9 before deleting it from Hatfield.

WTVW's petition for rehearing en banc was denied on February 2, 1959.

REASONS FOR GRANTING THE WRIT

I. THE NOTICE QUESTION

A. Introduction

This case presents an important question of interpretation of the notice procedures which Congress has imposed on administrative agencies in the exercise of their rulemaking functions. Such procedures are designed to afford all interested persons an opportunity to express their views on a potential rule *before* the rule is adopted. In Section 4 (a) of the APA, Congress has placed an affirmative burden of the agency to follow certain publication and notice procedures. However, the decision of the Commission, affirmed by the Court of Appeals, whittles away the established statutory safeguards by proclaiming the power of an agency to issue a limited notice and then to allow private persons to define the scope of the rulemaking proceeding. The effect is to require interested persons to proceed at their peril to guess what a rulemaking proceeding encompasses. The majority below has adopted an interpretation of Section 4 which is in conflict with that of the Ninth Circuit, as reflected by the Ninth Circuit's opinion in *Hotch* v. *United States*, 212 F. 2d 280 (1954).

B. The decision of the Court of Appeals is in derogation of the requirement of "complete and specific" notice of the subject matter of a rulemaking proceeding.

The Notice, reproduced in pertinent part above, contains no mention of Channel 9 or Hatfield. In addition, the caption of the Notice states only "Evansville, Indiana"; paragraph 2 of the Notice talks about "improving the immediate television situation in individual *communities*" (emphasis supplied); and the only city whose assignments are listed is Evansville, and the only VHF channel mentioned for possible deletion is Channel 7. This Notice clearly did not by

its terms give notice that this proceeding concerned "area" deintermixture. To the contrary, this Notice, by its terms, gave notice that this proceeding concerned "community" deintermixture, that is, the deletion of a VHF channel from the individual community of Evansville, and not the completely separate Hatfield community 21 miles from Evansville.

One of the grounds the Commisison relied on in denying the motion to strike of the Channel 9 applicants was its statement that the June 26, 1956, Report and Order (13 Pike & Fischer R.R. 1571) concluding the general television allocations proceeding, which was issued simultaneously with the Notice here, gave notice that the Commission was here concerned with "area" deintermixture, and Evansville and Hatfield are in the same general area. (References to the June 26 Report and Order appear in paragraphs 2 and 4 of the June 26 Notice.) However, in paragraph 2 of the Notice, the Commission indicated that the Report and Order related to deintermixture of "individual communities," not to "areas." Further, in the June 26, 1956. Report and Order, the Commission had said:

> ". . . the object of the proceeding . . . was to reach a decision as to the basic lines on which it would be in the public interest to revise the nationwide television system, and thus provide a basis for determining the specific reassignments which could usefully be made in *individual communities* in conformity with the nationwide policies adopted herein." (emphasis supplied) 13 Pike & Fischer R.R., at p. 1573)
>
> * * *
>
> ". . . the proponents of deintermixture have advocated the elimination of some or all of the VHF channel assignments in designated *cities*. . . . Thus, deintermixture has the dual aspect of re-

ducing or eliminating VHF assignments in some *communities* and of increasing the number of VHF assignments in others . . . It does not appear, however, that deintermixture at this stage would be practical in a sufficient number of *communities* representing a sufficiently large segment of the total population to provide significantly enhanced opportunities for the fuller utilization of the UHF channels on a nationwide basis." (emphasis supplied) (13 Pike & Fischer R.R., at p. 1576)

Since throughout the June 26, 1956, Report and Order the Commission spoke of "community" deintermixture, and at times of "community or area" deintermixture; the Report and Order was so ambiguous that it cannot be regarded as giving notice that proceedings such as the instant one concerned "area" deintermixture. Certainly, under these circumstances, private persons had a right to rely on the terms of the Notice itself, which defined the proceeding as limited to changes with respect to VHF Channel 7.

If this proceeding encompassed the potential deletion of Channel 9, Hatfield, it was a simple matter for the Commission to say so in its original Notice, or to issue a further or amended notice to that effect. In 1955 the Commission had held a rulemaking proceeding in which its notice did propose the deletion of both Channel 7, Evansville, and Channel 9, Hatfield. The failure of the Commission here to issue a similar notice appeared to be a purposeful limitation by the Commission of this proceeding to consideration of changes only with respect to Channel 7. In the general allocations proceeding prior to this case comments had been filed proposing the deletion of both Channel 7, Evansville, and Channel 9, Hatfield, so that when the Commission issued its Notice in this case without mentioning Channel 9, the logical conclusion was that

the Commission had decided that the potential deletion of Channel 9 was beyond the scope of this proceeding. The majority below refers to these and other background events to support its conclusion that there was a description of the subjects and issues involved (pp. 13-14, Slip Opinion), but it is from this very background that one would deduce that comments suggesting the deletion of Channel 9 were attempting to introduce an extraneous element into the proceeding. Moreover, the majority below was legally wrong in relying on events prior to June 26, 1956 (the date of the Notice), for there is no hint in the Notice that the public must delve into such antecedent matters to understand the scope of the proceeding.

However, the entire approach of the majority below is contrary to Section 4. It has gone through a lengthy analysis to determine what the June 26 Notice meant. In doing this, it has, in effect, held that there is an obligation on a private person to deduce, reason, and infer from documents and events within and without the proceeding to determine what actions the agency may lawfully take in the proceeding. However, Congress placed the burden of giving notice on the agency; interested persons should not be required to conjecture as to the bounds which the agency has placed on the proceeding. As Judge Fahy points out in his dissent, the notice contemplated by the Administrative Procedure Act must be "complete and specific":

> "The legislative history of the Administrative Procedure Act makes clear that the notice issued by the agency in compliance with the mandate of Sec. 4 (a) 'must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto,' and that 'where notice is required, it should be complete and specific.'" [S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946)] (p. 16, Slip Opinion)

And as the Attorney General's Manual on the Administrative Procedure Act observes:

> "Where there is a 'description of the subjects and issues involved', the notice should be sufficiently informative to assure interested persons an opportunity to participate intelligently in the rule making process. Final Report, p. 108". (pp. 29-30 of Manual).*

C. The Commission's counterproposal procedure is in conflict with the notice requirements governing legislative rule making proceedings contained in Section 4 of the Administrative Procedure Act.

A grave danger to the rights of private persons lies in the Commission's reliance here on a power to adopt "counterproposals falling within the general scope of the rule making proceeding" without giving public notice of the nature of counterproposals. Television allocations are handled, by the Commission's own choice, in *public* rule making proceedings, legislative in nature, in which any person has the right to file comments in support of or in opposition to a proposed revision of the Table of Assignments. It is impossible for the Commission or any one else to know who will regard themselves as interested in or affected by a particular potential change in the Table of Assignments and who will, hence, desire to file comments. The Commission recognizes this because it does not require that comments (including comments that contain counterproposals) be served on any one. Where an agency cannot know all the persons interested in a counterproposal set forth in comments, it should follow, as a matter of law, that it must give public notice of the substance of a counterproposal, for otherwise it may be depriving interested persons of their right to file comments directed to the potential rule.

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* See also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314-315 (1940).

Even assuming that WTVW and the Channel 9 applicants had reason to know that Channel 9 might be deleted under the Notice as it stood (and, as shown above, this was not the case), other persons interested in opposing the deletion of Channel 9 from Hatfield had no way of knowing that the possible deletion of Channel 9 was the subject matter of the proceeding and they had no opportunity to file comments. Vigorous popular feeling invariably arises where there is a plan to delete a VHF channel. A VHF assignment affords wide area coverage, which is something UHF channels are inherently unable to do. In all rule making cases that have been held involving the potential deletion of a VHF channel (e. g., the Peoria, Madison, Springfield (Ill.), and Hartford cases), a wide variety of persons and organizations have made their views in opposition to the deletion of the VHF channel known to the Commission. The present record contains much material, including comments, letters, and petitions by the Chamber of Commerce of Evansville, civic organizations, and other persons in opposition to the deletion of *Channel 7*. (See the Commission's reference to this fact at R. 757; J.A., p. 19). In the 1955 rule making proceeding, where the Commission gave notice that Channel 9, Hatfield, might be deleted (and where deletion of Channel 9 was rejected), there was a tremendous amount of material in opposition to the deletion of Channel 9, Hatfield, from the Chambers of Commerce of Hatfield, Indiana, and Owensboro, Kentucky, businessmen, civic organizations, governmental agencies, and private citizens in those cities. In contrast, this record is devoid of such material in opposition to the deletion of Channel 9. That three persons (the petitioners) knew that someone had filed comments suggesting that Channel 9 be deleted did not suffice to give notice to the many other members of the public who were interested in and affected by the rule.

The "counterproposal" procedure thus has the evil effect of converting proceedings which are supposed to be public into private ones, where only persons who happen to receive a copy of comments have any notion as to what potential allocation changes may be adopted and persons who do not learn of "counterproposals" which adversely affect their interests are deprived of the opportunity to express their opposition in advance of a "counterproposal" becoming a final rule. Section 4(b) of the APA provides that after notice has been given, the agency shall afford "interested persons" an opportunity to submit their views, but this Congressional direction is defeated by the "counterproposal" procedure.

In addition, even persons who receive comments containing "counterproposals" are deprived of the opportunity to comment effectively and intelligently. Any suggested change in the Table of Assignments is susceptible of many variations. In response to a plan to delete Channel 8 from city A and to reassign it to city B, someone may file comments proposing that Channel 8 be reassigned to city C instead of city B; someone else may suggest that Channel 8 be reassigned to city D instead of city B; someone else may suggest that Channel 5 as well as Channel 8 be deleted from city A; and someone else may support the shifting of Channel 8 to city B and also propose that Channel 12 be shifted from city D to city B. There are thus all sorts of gradations of new proposals that could be and *are* suggested in comments,* which makes it impossible to give any practical definitive meaning to "counterproposals falling within the general scope of the proceeding", a phrase which the Commission has never

*In the Madison Deintermixture Case, 15 Pike & Fischer R.R. 1563, participants suggested about 10 variations on the Commission's proposal to reserve Channel 3, Madison, for education.

attempted to define. Since no one can know if a "counterproposal" is relevant to the case, confusion reigns as to which proposals contained in comments are legitimate "counterproposals", and the confusion is not eliminated until the Commission issues its final order. It is unfair for persons to be required at their peril to expend time and money to oppose "counterproposals" which are advanced with negligible supporting data, or which appear to be beyond the scope of the proceeding or obviously without merit, or which the Commission ultimately rejects as on their face not in the public interest. Fatal errors of judgment can be made in this jungle of doubt as to what is the scope of the proceeding. The chaos that pervades these proceedings should be eliminated by this Court granting certiorari and ruling that "counterproposals" have no standing until they are acknowledged by the agency as having prima facie merit by the publication of a notice inviting comments.

The Commission's counterproposal procedure has been considered by the Committee on Communications of the Administrative Law Section of the American Bar Association, which submitted a report in 1958 concluding that it is unlawful, referring to the facts of this case. The Report of that Committee is reproduced in Appendix C hereto.

D. The case involves an important problem as to the meaning of "actual notice", as used in Section 4 of the Administrative Procedure Act.

The Commission concluded that the Channel 9 applicants had actual notice that Channel 9 might be deleted since they had filed a motion to strike comments suggesting the deletion of Channel 9. The Court of Appeals also concluded that there was actual notice. Both the Commission and the Court meant that

WTVW and the Channel 9 applicants had "actual notice" of the existence of comments suggesting the deletion of Channel 9. However, Section 4 (a) authorizes the agency to dispense with publication of notice where the persons subject to the rule making have "actual notice" of *the agency's notice of rule making*, not of what is said in a private person's pleading.

Of course, WTVW and the Channel 9 applicants had "actual notice" that comments suggested that Channel 9 be deleted, for they received the WFIE-WEHT comments in the mail, but they did not have "actual notice" (and did not know) that Channel 9 might be deleted in the proceeding. Only the latter kind of notice, which was not present, is meaningful.

"Actual notice" of the existence of a counterproposal cannot substitute for a new agency notice for other reasons. Section 4 (a) allows an agency to dispense with publication only if *all persons subject to* potential rules have actual notice. "Persons subject thereto" cannot be limited to applicants for a channel involved in the proceeding. "Persons subject thereto" in these proceedings include newspapers, radio stations, civic organizations, and private citizens of the cities whose television service would be affected by the proposed allocation, and national television networks, among others. These allocations rules do not have clearly defined "persons subject thereto", but many persons, whose identity cannot be known in advance, have legitimate interests in rules that may be adopted and should have the opportunity to comment. If the Commission is allowed to decide whether all "persons subject thereto" have actual notice of the counterproposal and then dispense with further notice, it will defeat the purposes of Section 4.

When new persons become subject to a rulemaking proceeding there must be a new notice. This follows inevitably from the requirement in Section 4 (a) that notice of rule making must be published in the Federal Register unless all persons subject to the rule making are named, and either are served or have actual notice. Without a new or further notice the agency has no means of naming the new person subject to the rule making and personally serving him in order to avoid the necessity of publication. The Commission is of the view, as reflected by its reliance on the counter-proposal procedure, that the Channel 9 applicants became persons subject to the rule making when they received the comments suggesting the deletion of Channel 9. At that point, however, as just shown, the Commission was powerless to avoid the issuance of a further notice.

E. The decision is in conflict with Hotch v. United States, decided by the Ninth Circuit.

In *Hotch* v. *United States, supra,* the appellant had been convicted of violating a Department of the Interior fishing regulation. The Ninth Circuit invalidated the conviction and declared the regulation void, holding that since neither the proposed regulation nor the regulation itself were ever published in the Federal Register, it was invalid even as to persons such as the appellant who had actual knowledge of its existence. The Court said, in part:

> "The Administrative Procedure Act and the Federal Register Act are more than mere recording statutes whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. [footnote omitted] The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures

> are complied with, the agency (or administrative) rule has not been legally issued, and consequently it is ineffective." (212 F. 2d, at p. 283)

The purport of the *Hotch* decision is that the notice procedures of Section 4 of the APA are jurisdictional in nature and that without careful observance of those procedures the agency's rule is invalid, regardless of what a litigant knows or of what he has notice. Judge Fahy, in his dissent below, stated, in effect, the same point of view:

> "Our review of the merits of Commission decisions is limited. One of the justifications for the limitations falls away if the parties are not afforded a full opportunity to be heard before the Commission itself. It is important, therefore, that the Commission carefully comply with the provisions Congress has provided for notice." (p. 16, Slip Opinion)

Although sought to be distinguished by the majority below (p. 14, Slip Opinion), a clear conflict is presented between the decision of the Ninth Circuit and the decision here complained of in the interpretation of the notice requirements of Section 4, in that the Ninth Circuit requires a strict and literal application of the Section 4 procedures, whereas the majority below authorizes a loose application, if not a complete evasion, of the notice procedures. This conflict between the two circuits on a problem of broad significance warrants review by this Court.

The obligation of an agency to issue a revised notice when the scope of the rule making proceeding is altered, as here, is also reflected by two Tariff Commission cases. In *Schmidt Pritchard & Co. v. United States*, 167 F. Supp. 272 (United States Customs Court, 2d Div., 1958), the appellant challenged a tariff on the ground that it was based on a supplemental in-

quiry which exceeded the scope of the original inquiry and the Commission had failed to give public notice and hold public hearings with respect to the supplemental inquiry. The Court upheld this contention saying:

> "Obviously, the scope of inquiry requested of the Commission [by the President] both in economic research and in point of time exceeded the scope of the original inquiry and the facts which were set forth in the March 14, 1955, report of the Tariff Commission, and should necessitate renewal of the statutory requirements for appropriate proceedings by the Tariff Commission." (167 F. Supp., at p. 272)

Similarly, in *Carl Zeiss, Inc.* v. *United States,* 76 F. 2d 412 (Court of Customs and Patent Appeals, 1935), the court held a report of the Tariff Commission invalid on the ground that the publication of a notice of an investigation as to instruments "used by" the Armed Forces did not suggest to interested persons that the investigation encompassed instruments "suitable to be used by" the Armed Forces.

In the instant case, the suggestion that Channel 9 be deleted involved new questions and required new engineering studies as to loss of service, for the problems are quite different where both Channels 7 and 9 may be deleted than where Channel 7 only may be deleted. Consequently, within the principle of the cases cited, an additional notice was required when the Commission decided to expand the proceeding to involve the possible deletion of Channel 9.

F. The Court of Appeals' decision announces the erroneous principle that deficiencies in an agency's observance of the procedures in Section 4 of the Administrative Procedure Act are corrected by the opportunity to petition for reconsideration.

The majority below held that even if there were substance to the claim by the Channel 9 applicants of lack of earlier notice of the full import of the rule making, the final Report and Order did give them notice, and they could have sought reconsideration under Section 405 of the Act (p. 11, Slip Opinion). This position invites agency disregard of Section 4 and is irreconcilable with the position of the Ninth Circuit that strict observance of the Section 4 procedures is a condition precedent to the adoption of a valid rule.

Moreover, the Channel 9 applicants and all other interested persons had the right to be heard before the final decision and to have their arguments weighed contemporaneously with the comments favoring the deletion of the channel. As this Court has said:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."

Opp Cotton Mills v. *Administrator*, 312 U.S. 126, 152-3 (1941). The right to a hearing "after the ax [has] fallen" is "a dubious opportunity." *Farmer* v. *United Electrical Radio & Machine Workers*, 93 U.S. App. D.C. 178, 211 F. 2d 36, 40 (1953), cert. den. 347 U.S. 943. Had there been notice that Channel 9 might be deleted in the case and had the persons opposing that plan been afforded the opportunity to file comments, the Commission might have decided not to delete Channel 9. The Channel 9 applicants were not obliged, as

the majority below has concluded, to forget about the loss of their rights to notice, to file comments, to file reply comments, and to have their views considered contemporaneously with the views of persons favoring the deletion of the channel *before* final action.*

G. Conclusion on the Notice Question

The Court of Appeals' decision allows the Commission to issue a limited notice and then let the proceeding take whatever form and shape private litigants want it to take. It allows the Commission to decide for itself whether circumstances are such that a person should have expected that a particular allocations rule might be adopted, regardless of what the Commission said in its notice. It also allows the Commission to adopt counterproposals without further notice, thereby depriving interested persons of an opportunity to comment. If allowed to stand, the decision grants the Commission an exemption from Section 4 of the APA. The decision can be expected to affect every television allocations proceeding.

Because of the importance of the case to the rule-making processes of the Federal Communications Commission and of other government agencies, the Court should grant certiorari.

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* "In the 'rule making' (that is, 'legislative') function it [the APA] provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration *before* the issuance of general regulations (sec. 4)." (emphasis supplied) Report of the House of Representatives Committee on the Judiciary, U.S. Code Congressional Service, 79th Congress, Second Session, 1946, p. 1195, at p. 1205.

II. THE DELETION OF CHANNEL 9 WAS PREMISED ON THE OCCURRENCE OF AN IMAGINARY EVENT.

The only ultimate justification for the deletion of Channel 9 is in the Commission's declaration that "The action we are taking will result in the Evansville area becoming an all-UHF market." (J.A., p. 31; par. 27, March 1, 1957 Report and Order). The Commission, however, is powerless to delete VHF Channel 7 at Evansville without first holding an evidentiary hearing under Section 316 of the Communications Act, since the operator of Channel 7 holds a construction permit.

A Section 316 hearing involving Channel 7 is presently in progress. However, unless the question has been improperly prejudged and the requirements of Section 316 are empty rights, whether the Evansville area will become an all-UHF market cannot now be determined. Thus, the Channel 9 applicants are in the anomalous position of losing the channel they sought for three years in a comparative hearing in order that all VHF service would be deleted from the Evansville area, although it cannot be presently determined until the conclusion of the Section 316 hearing whether Channel 7 will, in fact, be deleted from Evansville.

The deletion of Channel 9 was accordingly premature, based on a condition subsequent which may never occur, and which therefore could not properly form the foundation for legal agency action.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that the instant petition for a writ of certiorari be granted.

Respectfully submitted,

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